

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

Ms. L.; et al.,  
Petitioners-Plaintiffs,  
v.  
U.S Immigration and Customs  
Enforcement (“ICE”); et al.,  
Respondents-Defendants.

Case No.: 18cv0428 DMS (MDD)

**ORDER GRANTING PLAINTIFFS’  
MOTION TO MODIFY CLASS  
DEFINITION**

Last spring, the Attorney General of the United States announced a controversial “zero tolerance” policy for all persons crossing the border illegally. Under the policy, parents and children who crossed the border illegally were separated, and the children were placed in the custody of the Department of Health and Human Services (“HHS”), Office of Refugee and Resettlement (“ORR”). Several weeks before the Attorney General’s announcement of the zero tolerance policy, Plaintiffs filed the present case alleging they, and a class of similarly situated individuals, had been forcibly separated from their children by government officials at the border. Plaintiffs alleged these separations were the result of a nationwide policy that had been implemented well before the announcement of the zero tolerance policy and that the policy had resulted in the indiscriminate separation of migrant families both at and between designated ports of entry. Plaintiffs challenged this

1 family separation policy as a violation of their substantive due process rights to family  
2 integrity under the Fifth Amendment to the United States Constitution.

3 On June 26, 2018, this Court granted Plaintiffs' motions for class certification and  
4 for a preliminary injunction, and ordered reunification of the children in ORR custody with  
5 their parents within 30 days. (*See* ECF Nos. 82, 83.) Pursuant to the Court's Orders, 2,816  
6 children were identified as having been separated from their parents at the border, and  
7 nearly all of them have now been reunified with their parents or otherwise discharged in  
8 accordance with their parents' wishes.

9 Recently, the HHS Office of Inspector General ("OIG") conducted an internal  
10 investigation into the Administration's zero tolerance policy given "the potential impact of  
11 [the policy] on vulnerable children and ORR operations[,] and "to determine the number  
12 and status of separated children who have entered ORR care" as a result of the policy. On  
13 January 17, 2019, the OIG issued a Report on its investigation entitled, "Separated Children  
14 Placed in Office of Refugee Resettlement Care." That Report reveals the Department of  
15 Justice ("DOJ") and the Department of Homeland Security ("DHS") began separating  
16 migrant families as early as July 1, 2017, well before the zero tolerance policy was publicly  
17 announced in May of 2018, and that pursuant to the policy, potentially "thousands" more  
18 families had been separated.

19 In granting class certification, this Court generally defined the class to include  
20 parents who had entered the United States at or between ports of entry, who were, had been  
21 or would be detained in immigration custody by DHS, and had a minor child who was  
22 separated from them and detained in ORR custody at or after that time. Specifically, the  
23 class was defined as follows:

24 All adult parents who enter the United States at or between designated ports  
25 of entry who (1) have been, are, or will be detained in immigration custody  
26 by the DHS, and (2) have a minor child who is or will be separated from them  
27 by DHS and detained in ORR custody, ORR foster care, or DHS custody,  
absent a determination that the parent is unfit or presents a danger to the child.

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1 (ECF No. 82 at 17.) In implementing the Court’s preliminary injunction and reunification  
2 order, Defendants limited this class to parents whose children were “detained in ORR  
3 custody, ORR foster care, or DHS custody” on the date the preliminary injunction was  
4 issued, June 26, 2018. Defendants did not include in the class those parents whose children  
5 were released from ORR custody *before* June 26, 2018. As a result, those parents—the  
6 potentially “thousands” identified by OIG—were not reunified with their children pursuant  
7 to the Court’s preliminary injunction. Plaintiffs now move to clarify that the class certified  
8 in the Court’s Order includes those parents, or in the alternative, to modify the class  
9 definition to include those parents. After reviewing the parties’ briefs and relevant legal  
10 authority, and hearing argument from counsel, the Court grants Plaintiffs’ motion to  
11 modify the class definition.

12 Defendants oppose the motion on several grounds. They contend that expanding the  
13 class to include these parents would run afoul of the adequacy, typicality and commonality  
14 requirements of Federal Rule of Civil Procedure 23(a), and present ascertainability  
15 problems. Defendants argue parents whose children were released from government  
16 custody before June 26, 2018, are in a different legal position from parents whose children  
17 were in government custody on or after that date. They also argue Plaintiffs delayed raising  
18 this issue, and that it would be unfair to Defendants to expand the class after they have  
19 reunified so many class members with their children.

20 There is no dispute “courts retain discretion to revisit class certification throughout  
21 the legal proceedings, and may rescind, modify, or amend the class definition in light of  
22 subsequent developments in the litigation.” *Krueger v. Wyeth, Inc.*, 310 F.R.D. 468, 473-  
23 74 (S.D. Cal. 2015). This authority is found in Federal Rule of Civil Procedure 23(c)(1)(C),  
24 which states, “[a]n order that grants or denies class certification may be altered or amended  
25 before final judgment[.]” and in Supreme Court case law. *See Gen. Tel. Co. v. Falcon*, 457  
26 U.S. 147, 160 (1982) (“Even after a certification order is entered, the judge remains free to  
27 modify it in the light of subsequent developments in the litigation.”) “In considering the  
28 appropriateness of [modification or] decertification, the standard of review is the same as

1 a motion for class certification: whether the Rule 23 requirements are met.” *Roy v. County*  
 2 *of Los Angeles*, No. CV 13-04416-AB (FFMx), 2018 WL 3435417, at \*2 (C.D. Cal. July  
 3 11, 2018) (quoting *Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 479 (C.D. Cal.  
 4 2008)). *See also Lyon v. U.S. Immigration & Customs Enforcement*, 308 F.R.D. 203, 210-  
 5 11 (N.D. Cal. 2015); *Astiana v. Kashi Co.*, 295 F.R.D. 490, 492 (S.D. Cal. 2013) (same).

6 Here, Plaintiffs first notified the Court of their concerns with the class definition in  
 7 the November 29, 2018 Joint Status Report (“JSR”). (*See* ECF No. 329.) In that document,  
 8 Plaintiffs’ counsel stated that on November 16, 2018, they “learned of a separated parent  
 9 who feared imminent removal because her child was released from ORR custody before  
 10 June 26, 2018.” (*Id.* at 18.) Plaintiffs’ counsel stated during the subsequent status  
 11 conference that they had learned of “a handful” of such cases. (ECF No. 332 at 16.)  
 12 Counsel informed the Court they had met and conferred on this issue, and “agreed that  
 13 removals of individuals in this category be stayed pending the Court’s resolution.” (ECF  
 14 No. 329 at 18.) Defense counsel requested that the issue be resolved by way of a formal  
 15 noticed motion, to which the Court agreed.

16 Thereafter, Plaintiffs filed the present motion based on the information they had at  
 17 that time. Before Defendants filed their response, the case was stayed because of the  
 18 government shutdown. During the stay, OIG issued its Report. As noted above, the  
 19 purpose of the OIG investigation was to determine the number and status of separated  
 20 children “who have entered ORR care, including but not limited to the subset of separated  
 21 children covered by [the present case,] *Ms. L. v. ICE*.” (Report at 1.) OIG found the  
 22 following:

23 In the summer of 2017, prior to the formal announcement of the zero-tolerance  
 24 policy, ORR staff and officials observed a steep increase in the number of  
 25 children who had been separated from a parent or guardian by DHS  
 26 (“separated children”) and subsequently referred to ORR for care.[ ] Officials  
 27 estimated that ORR received and released thousands of separated children  
 28 prior to a June 26, 2018, court order in *Ms. L v. ICE* that required ORR to  
 identify and reunify certain separated children in its care as of that date.

1 (*Id.*) Although the Administration’s zero tolerance policy was publicly announced in May  
2 2018, the OIG Report states, “From July through November 2017, the El Paso sector of  
3 Customs and Border Protection (CBP), an agency within DHS, implemented new policies  
4 that resulted in 281 families being separated.” (*Id.* at 3.) During this same period, July  
5 through November 2017, ORR staff “observed a significant increase in the number and  
6 proportion of separated children (i.e., children separated from their parent or legal guardian  
7 by DHS) relative to other UACs [unaccompanied alien children].” (*Id.*) “Overall, ORR  
8 and ASPR [the Office of the Assistant Secretary for Preparedness and Response] officials  
9 estimate that thousands of separated children entered ORR care and were released prior to  
10 the June 26, 2018 court order.” (*Id.*)

11       Clearly, the OIG Report is a significant development in this case. And, importantly,  
12 the contents of the Report are undisputed. The most significant facts to come out of the  
13 Report are (1) that in the summer of 2017, DOJ and DHS were separating parents and  
14 children at the border pursuant to the Administration’s new policy, and (2) during and after  
15 that time, potentially thousands of children who had been separated from a parent were  
16 received by ORR and subsequently discharged from ORR custody to designated sponsors  
17 pursuant to the Trafficking Victims Protection and Reauthorization Act (“TVPRA”), Pub.  
18 Law No. 110-457 (Dec. 13, 2008), prior to the Court’s June 26, 2018 Orders.

19       Defendants suggest this information is not a new development, but rather something  
20 the parties knew about, or should have known about, when the Court issued its Orders.  
21 However, that suggestion stands in stark contrast to Defendants’ representations in this  
22 case in as late as May of 2018 that the government did not have either a policy or practice  
23 of separating families at the border. (*See* ECF No. 61 at 10 (stating Plaintiffs failed to point  
24 to an “actual Government policy or practice regarding separation” but were instead  
25 “challenging a number of different immigration and criminal enforcement actions by  
26 multiple agencies which, when taken with regard to the named Plaintiffs, resulted in the  
27 separation of each named Plaintiff from her child.”); *see also* ECF No. 70 at 5 (disputing  
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1 that there was a policy or practice of family separation).<sup>1</sup> In light of those representations,  
2 it is unreasonable to suggest that Plaintiffs should have known that potentially thousands  
3 of parents and children had been separated at the border prior to the Court's June 26, 2018  
4 Orders.<sup>2</sup> Given the subsequent, undisputed developments set out in the OIG Report,  
5 modification of the class is warranted if the class, as modified, meets the requirements of  
6 Federal Rule of Civil Procedure 23.

7 As set out in the Court's previous order on class certification, Rule 23(a) sets out the  
8 requirements of numerosity, commonality, typicality and adequacy of representation.  
9 Numerosity is not disputed as there are thousands of members in the class as currently  
10 certified, so the Court turns first to commonality. In the previous order on class  
11 certification, the Court found the commonality requirement was met given the evidence of  
12 a "common practice" of "separating migrant parents and children and failing to reunite  
13 them without a showing the parent is unfit or presents a danger to the child." (ECF No. 82  
14 at 12.) The Court went on to state: "Whether that practice violates substantive due process  
15 is a question common to the class, and the answer to that question is 'apt to drive the  
16 resolution of the litigation.'" (*Id.*) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338,  
17 350 (2011)). That finding applies equally to the proposed modified class.

18 There is no dispute the parents who have been excluded from the class were also  
19 subjected to this "common practice." Like the current members of the class, they, too,  
20 were separated from their children by DOJ and DHS, their children were placed in ORR  
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23 <sup>1</sup> The Court notes the latter representation was made only a few days before the Attorney  
24 General publicly announced the zero tolerance policy under which children were to be  
separated from their parents if they entered the country illegally.

25 <sup>2</sup> Undoubtedly, Plaintiffs would have discovered the total number of separated children in  
26 ORR custody through normal discovery channels in this litigation. However, the parties  
27 did not engage in discovery at the outset of the litigation. Instead, they properly focused  
28 their intense efforts on implementing the Court's preliminary injunction, which required  
reunification of children with their parents within 14 days (for children under age 5) and  
30 days (for children over 5).



1 custody, and they were not reunified with their children despite the absence of any finding  
2 they were unfit parents or presented a danger to their children. These parents, like those  
3 presently in the class, present the identical question, namely did that practice violate the  
4 parents' rights to substantive due process, and the answer to that question applies to all  
5 these parents, not just those whose children were in ORR custody on June 26, 2018.

6 Defendants argue this new group of parents presents a different legal and factual  
7 situation from the current class members because the children of this new group are no  
8 longer in ORR custody, and thus, reunification of these parents and their children may be  
9 impossible or ill-advised. However, this argument goes to the issue of remedy, not liability,  
10 and Ninth Circuit case law makes clear that a difference in remedies does not necessarily  
11 defeat a showing of commonality. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9<sup>th</sup>  
12 Cir. 1998) ("The existence of shared legal issues with divergent factual predicates is  
13 sufficient, as is a common core of salient facts coupled with disparate legal remedies within  
14 the class."); *see also Parra v. Bashas', Inc.*, 536 F.3d 975, 979 (9<sup>th</sup> Cir. 2008) (rejecting  
15 argument that "redressing the harm and calculating the various pay disparities for the  
16 different employment positions precludes class certification."). Further, reunification is  
17 not the only remedy available here. Other remedies may be appropriate, and they would  
18 apply to all class members. For instance, as OIG has suggested, an accounting is a  
19 necessary first step to determine the "number and status" of separated children who were  
20 in ORR custody at any time.<sup>3</sup> And, finally, Defendants' argument ignores Plaintiffs'  
21 request for declaratory relief, namely a declaration that the separation of class members  
22 from their children was and is unlawful. (Am. Compl. at 14.) This remedy would be

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28 <sup>3</sup> That accounting necessarily would provide important information about the number and  
status of the proposed modified parent class members.

1 available to all class members regardless of the custodial status of their children.<sup>4</sup> Thus,  
2 the newly proposed class satisfies the commonality requirement.<sup>5</sup>

3 Next, Defendants argue the proposed modification to the class definition does not  
4 satisfy the adequacy requirement. Specifically, they assert “Plaintiffs’ proposed expansion  
5 of the class would ... create an adequacy problem, because no named class member at the  
6 time class certification was being briefed was in the situation where her child had been  
7 released from ORR custody to a sponsor.” (Defs.’ Opp’n to Mot. at 2; *see also id.* at 16  
8 (arguing “the named plaintiffs ... cannot be adequate class representatives for the expanded  
9 class ... because neither of their children were released to other sponsors, and both of them  
10 sought reunification with their child directly from ORR.”)) However, it is unclear how the  
11 location of the separated children would render the class representatives inadequate.  
12 Defendants do not assert the location of the separated children creates a conflict between  
13 the named Plaintiffs and their counsel and the newly proposed class members. Nor do they  
14 assert that the named Plaintiffs would not vigorously prosecute the action on behalf of these  
15 newly proposed class members. Indeed, the named Plaintiffs and their counsel have  
16 vigorously prosecuted this action on behalf of parents who were removed from the United  
17 States even though they themselves were not removed. There is simply no evidence or  
18 reason to believe that the named Plaintiffs or their counsel would not vigorously prosecute  
19 this action on behalf of parents who were subjected to the same government policy but  
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22 <sup>4</sup> Plaintiffs’ request for declaratory relief also satisfies the requirement of Rule 23(b)(2),  
23 which states class certification is appropriate if “the party opposing the class has acted or  
24 refused to act on grounds that apply generally to the class, so that final injunctive *or*  
25 *declaratory relief* is appropriate respecting the class as a whole[.]” Fed. R. Civ. P. 23(b)(2)  
(emphasis added).

26 <sup>5</sup> As with the motion for class certification, the parties’ arguments on typicality mirror their  
27 arguments on commonality. Given the overlap of these issues in this case, the reasoning  
28 set out above and in the class certification order, (ECF No. 82 at 13-14), leads the Court to  
conclude the typicality requirement is satisfied.



1 whose children were released from ORR custody prior to June 26, 2018. On the contrary,  
2 Plaintiffs' counsel represented to the Court that they stand ready to put together another  
3 steering committee to assist any newly identified class members in the event this motion is  
4 granted. (ECF No. 364 at 34.) Under these circumstances, the newly proposed class  
5 satisfies the adequacy requirement.

6 In addition to these Rule 23 factors, Defendants raise several other arguments against  
7 modifying the class definition. First, although Defendants recognize that ascertainability  
8 is not a requirement for class certification, they argue the proposed modification to the  
9 class definition "would make it nearly impossible to ascertain the class with any level of  
10 certainty." (Defs.' Opp'n to Mot. at 5.) In essence, they assert it would be too burdensome  
11 for them to identify the members of the newly proposed class, therefore the class should  
12 not be modified.

13 As an initial matter, the Court notes this is not a valid argument against either class  
14 certification or modification of a previously certified class. *See Briseno v. ConAgra Foods,*  
15 *Inc.*, 844 F.3d 1121, 1125-26 (9<sup>th</sup> Cir.) (rejecting assertion that, in addition to satisfying the  
16 requirements of Rule 23, "class proponents must also demonstrate that there is an  
17 administratively feasible way to determine who is in the class."), *cert. denied by ConAgra*  
18 *Brands, Inc. v. Briseno*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 313 (2017). This is especially so here,  
19 where the difficulty in identifying proposed class members is the result of Defendants' own  
20 record keeping practices, or lack thereof. *See Agne v. Papa John's Int'l, Inc.*, 286 F.R.D.  
21 559, 566 n.6 (W.D. Wash. 2012) (stating "it would be unfair to deny class certification  
22 because of the potential difficulty of identifying the class members where that difficulty is  
23 mostly due to the fact that [Defendant] destroyed the call lists that it used."); *Raffin v.*  
24 *Medicredit, Inc.*, No. 15-4912-GHK (PJWx), 2017 WL 131745, at \*6 n.5 (C.D. Cal. Jan.  
25 3, 2017) (stating "courts generally do not bar class certification where the defendant's own  
26 destruction of records causes difficulty in identifying class members.") The argument  
27 holds even less weight here because Plaintiffs are not seeking class certification under Rule  
28 23(b)(3), which calls for consideration of the difficulties in identifying class members as

1 part of the “superiority” requirement. *See Pierce v. County of Orange*, 526 F.3d 1190,  
 2 1200 (9<sup>th</sup> Cir. 2008) (finding no abuse of discretion in denying certification of Rule 23(b)(3)  
 3 class “in light of expected difficulties identifying class members and determining  
 4 appropriate damages.”) Rather, the class in this case is certified under Rule 23(b)(2), which  
 5 does not have a similar requirement.

6 Furthermore, although the process for identifying newly proposed class members  
 7 may be burdensome, it clearly can be done. Indeed, Jallyn Sualog, who is leading ORR’s  
 8 efforts to reunify separated parents and children, has set out the process of identifying these  
 9 newly proposed class members. (*See* Decl. of Jallyn Sualog in Supp. of Defs.’ Opp’n to  
 10 Mot. ¶¶ 13-20.) Thus, Defendants’ argument of burden does not warrant denial of the  
 11 present motion.

12 Defendants also suggest it would be more appropriate for the newly proposed class  
 13 members to bring individual cases rather than include them in this case. (ECF No. 364 at  
 14 52.) Like the issue of burden, this argument also goes to the issue of superiority under  
 15 Rule 23(b)(3). *See* Fed. R. Civ. P. 23(b)(3)(A) (listing as factor for consideration “the class  
 16 members’ interests in individually controlling the prosecution or defense of separate  
 17 actions[.]”) Even if this argument applied here, it would weigh in favor of granting the  
 18 motion, not denying it. As the Ninth Circuit stated in *Smith v. Los Angeles Unified School*  
 19 *Dist.*, 830 F.3d 843 (9<sup>th</sup> Cir. 2016), “[c]ourts have long recognized the benefits conferred  
 20 by the class action mechanism over numerous individual actions[.]” (*id.* at 863),  
 21 particularly in civil rights actions where a government practice or policy is at issue.  
 22 *Parsons v. Ryan*, 754 F.3d 657, 686-87 (9<sup>th</sup> Cir. 2014) (stating primary purpose of Rule  
 23 23(b)(2) “has always been the certification of civil rights class actions.”) In fact, near the  
 24 beginning of this case when separate lawsuits were being filed across the country,  
 25 Defendants advocated for consolidation and avoidance of separate actions in multiple fora.  
 26 *See, e.g., State of Wash. v. United States*, Case No. 18cv1979 DMS (MDD), ECF No. 22  
 27 (Defendants’ motion to dismiss, or in the alternative, to transfer venue to this Court);

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1 *M.M.M. v. Sessions*, Case No. 18cv1832 DMS (MDD), ECF No. 21 at 21 (reflecting  
2 Defendants' request to transfer case to this Court).

3 Now that Defendants have complied with this Court's preliminary injunction, it  
4 appears they want to reverse course and have these newly identified parents file individual  
5 cases throughout the country. However, forcing individual parents to bring separate  
6 lawsuits challenging separation from their children makes little sense when precisely that  
7 same legal claim has already been certified for class treatment in this case. It also ignores  
8 the harsh reality of this case, namely that 471 parents in the presently defined class were  
9 removed from this country without their children. (ECF No. 382 at 6.) Unless members  
10 of the newly proposed class are identified, it will remain unknown how many of them, if  
11 any, were also removed without their children, though it is probable that many will have  
12 suffered the same fate as the 471 parents mentioned above. The ability of any such  
13 removed parents to pursue individual claims in this country would be virtually impossible.

14 Defendants also argue the Court should not modify the class definition because this  
15 is not the proper forum in which to account for the parents who were separated from their  
16 children at the border by DOJ and DHS, and whose children were released from ORR  
17 custody prior to June 26, 2018. (ECF No. 364 at 54.) Specifically, at the hearing on this  
18 matter, defense counsel argued: "Litigation doesn't necessarily exist to resolve every issue  
19 ...." (*Id.*) Instead, counsel noted, other branches of government can get to the bottom of  
20 the issue. (*Id.* ("The executive branch itself with OIG Reports ... is a possibility."))

21 The other branches, of course, are free to investigate these issues, and they are doing  
22 so. In addition to OIG, Congress has been holding hearings on these issues and issuing  
23 subpoenas to the Defendants in this case. See, Colleen Long, *House Targets Family*  
24 *Separations in First Trump Subpoena*, AP News (Feb. 26, 2019),  
25 <https://www.apnews.com/0b012aaaa6454a10a585eb4a848c8541>; Colleen Long et al.,  
26 *Kirstjen Nielsen testifies on border security, future of border wall*, PBS News (Mar. 6,  
27 2019, 5:17 PM EST), [https://www.pbs.org/newshour/politics/watch-live-homeland-](https://www.pbs.org/newshour/politics/watch-live-homeland-security-secretary-kirstjen-nielsen-testifies-before-house-committee)  
28 [security-secretary-kirstjen-nielsen-testifies-before-house-committee](https://www.pbs.org/newshour/politics/watch-live-homeland-security-secretary-kirstjen-nielsen-testifies-before-house-committee). Clearly, the matter

1 of determining the “number and status of separated children” who have entered ORR care  
2 at any point in time because of the Administration’s family separation policy is not going  
3 away. Every branch of government is now invested in the process. But that does not mean  
4 the Court should abdicate its role in this matter. The quintessential duty of the courts is to  
5 determine controversies involving matters of constitutional significance; to ensure that the  
6 actions of government officials do not violate fundamental constitutional rights, and if they  
7 do, to address them. *See Marbury v. Madison*, 5 U.S. 137, 178 (1803) (stating the  
8 resolution of constitutional questions “is the very essence of judicial duty.”); *The Federalist*  
9 *No. 78* (Alexander Hamilton) (stating it is the “duty” of the courts “to declare all acts  
10 contrary to the manifest tenor of the Constitution void. Without this, all the reservations  
11 of particular rights or privileges would amount to nothing.”)

12 This Court has before it a case involving a class of parents who were separated from  
13 their children at the border by DOJ and DHS pursuant to government policy. The present  
14 motion asks the Court to modify the class definition to include all parents who were  
15 subjected to that policy, not just those whose children were in ORR custody on June 26,  
16 2018. That question clearly falls within the scope of this case, and the Court has an  
17 obligation to resolve that question and to provide relief to these parents, if appropriate  
18 under law. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996) (“It is the role of courts to provide  
19 relief to claimants, in individual or class actions, who have suffered, or will imminently  
20 suffer, actual harm[.]”).

21 Defendants’ final argument is essentially one of equity. Specifically, they argue they  
22 have been operating under the assumption that the class was limited to parents whose  
23 children were in ORR custody on June 26, 2018, and it would be unfair to them to now  
24 enlarge the class and force them to identify and reunify these other parents and their  
25 children. This argument overlooks the profound importance of the reunification effort,  
26 which entailed a search for parents who had been separated from their minor children under  
27 questionable circumstances; it ensured every reasonable effort was employed to avoid the  
28 very real possibility of a permanently orphaned child due to the actions of one or more

1 government officials. Whether it is fair to Defendants to require them to identify and  
2 possibly reunite another group of parents and children who were separated pursuant to the  
3 same government policy is not relevant to the purely legal issue presently before this Court,  
4 *i.e.*, whether the class definition in this case should be modified. The factors relevant to  
5 that inquiry have been discussed above, and they warrant modification of the class  
6 definition here.

7 The hallmark of a civilized society is measured by how it treats its people and those  
8 within its borders. That Defendants may have to change course and undertake additional  
9 effort to address these issues does not render modification of the class definition unfair; it  
10 only serves to underscore the unquestionable importance of the effort and why it is  
11 necessary (and worthwhile).

12 In sum, that Plaintiffs were alerted to the existence of a handful of parents within  
13 this group, and that subsequent investigation by the OIG confirmed that there was not just  
14 a handful but potentially thousands of parents in this group, does not render modification  
15 of the class definition unfair. Rather, modification of the class definition falls squarely  
16 within the confines of Supreme Court precedent and Rule 23(c)(1)(C), which give courts  
17 broad discretion to alter or amend a class definition considering subsequent developments  
18 in a case. *See Armstrong v. Davis*, 275 F.3d 849, n.28 (9<sup>th</sup> Cir. 2001) (stating district courts  
19 have “broad discretion” to revisit class certification “throughout the legal proceedings  
20 before the Court.”), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499,  
21 504-05 (2005).

22 Subsequent developments have occurred here, and the modified class, like the  
23 original class, satisfies the requirements of Rule 23. Accordingly, Plaintiffs’ motion to  
24 modify the class definition is granted. The previously certified class is modified as follows:

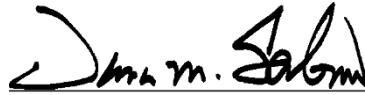
25 All adult parents who entered the United States at or between designated ports  
26 of entry on or after July 1, 2017, who (1) have been, are, or will be detained  
27 in immigration custody by the DHS, and (2) have a minor child who has been,  
28 is or will be separated from them by DHS and has been, is or will be detained

1 in ORR custody, ORR foster care, or DHS custody, absent a determination  
2 that the parent is unfit or presents a danger to the child.<sup>6</sup>

3 Although the parties addressed the issue of the relief to be afforded to the newly  
4 included class members both in their briefs and at oral argument, the Court declines to  
5 resolve that issue in the present order. Rather, pursuant to Defendants' request, the Court  
6 stays application of its preliminary injunction to the newly included class members pending  
7 further briefing from the parties as to what specific relief Plaintiffs request and are entitled  
8 to at this stage of the case. The parties should be prepared to address these issues in the  
9 next JSR.

10 **IT IS SO ORDERED.**

11 Dated: March 8, 2019

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13 Hon. Dana M. Sabraw  
14 United States District Judge  
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27 <sup>6</sup> The class as modified is subject to the same qualifications as the originally certified class  
28 with respect to, for example, criminal history and communicable disease. (ECF No. 82 at  
10-11, 17 n. 10.)